

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

OSCAR MENDOZA,

Defendant.

NO: CR-10-2091-RMP-1

ORDER DENYING DEFENDANT'S
MOTION TO VACATE, SET ASIDE,
OR CORRECT SENTENCE UNDER
28 U.S.C. § 2255

Before the Court is Defendant Oscar Mendoza's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, ECF No. 203, and motion for appointment of counsel, ECF No. 204. The Court has reviewed the motions, all other relevant filings, and is fully informed.

BACKGROUND

On August 10, 2010, Mr. Mendoza and co-defendant Hector Martinez were charged by indictment in case number CR-10-2091-RMP with one count of knowingly and intentionally combining, conspiring, confederating, and agreeing to

ORDER DENYING DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR
CORRECT SENTENCE UNDER 28 U.S.C. § 2255 ~ 1

1 manufacture over 1000 marijuana plants in violation of 21 U.S.C. §§ 841(a)(1) and
2 846, and a second count of knowingly and intentionally manufacturing and
3 possessing with intent to manufacture over 1000 marijuana plants in violation of
4 21 U.S.C. § 841(a)(1) and 19 U.S.C. § 2. ECF No. 26 at 1-2. On November 16,
5 2010, a superseding indictment charged Mr. Mendoza with both original counts
6 and with knowingly possessing a firearm in furtherance of a drug trafficking crime
7 in violation of 18 U.S.C. § 924(c)(1)(A). ECF No. 88 at 2.

8 On April 29, 2011, Mr. Mendoza pleaded guilty to an Information
9 Superseding the Indictment charging Mr. Mendoza with manufacturing more than
10 50 marijuana plants in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(D), and
11 possession of a firearm in furtherance of a drug trafficking crime in violation of 18
12 U.S.C. § 924(c). ECF No. 149 at 1-2. In his plea agreement, Mr. Mendoza agreed
13 that the following was true and could be proven beyond a reasonable doubt:

14 On July 22, 2010 . . . law enforcement approached a tarp/living
15 area near [a marijuana grown operation located in a remote rural area
16 off of Bickleton Highway near Bickleton, WA]. Law enforcement
located and arrested Oscar Mendoza and Hector Martinez under the
tarp. Both were taken into custody without incident.

17 Law enforcement also located a path leading from the
tarp/living area to the marijuana grow site. The distance from the
18 tarp/living area to the grow is approximately 108 yards. Law
enforcement located and seized approximately 12,296 living
marijuana plants planted in the soil.

19 Law enforcement also located a kitchen/cooking area in
between the sleeping area and the grow area. In the sleeping area,
20 officers located two boxes of .22 caliber ammunition. Hidden
underneath pine needles and other forest debris was a Ruger model

1 10/22, .22 caliber rifle. The rifle was located within an arm's reach of
2 persons within the sleeping area.

3 ECF No. 149 at 6-7.

4 As part of the Fed. R. Cr. P. 11(c)(1)(C) plea agreement, Mr. Mendoza
5 agreed to waive his appeal rights and the right to attack his conviction or sentence
6 by motion under § 2255 in exchange for an agreed upon forty-two month sentence
7 for the manufacturing charge and sixty month consecutive sentence for possession
8 of a firearm in furtherance of a drug trafficking crime, for a total sentence of 102
9 months of incarceration, and a three-year term of supervised release. ECF No. 149
10 at 11. Mr. Mendoza agreed that should such a sentence be imposed, he was
11 waiving his right to file any § 2255 motion except a motion "based upon
12 ineffective assistance of counsel based on information not now known by the
13 Defendant and which, in the exercise of due diligence, could not be known by
14 Defendant by the time the Court imposes the sentence." ECF No. 149 at 13.

15 On July 26, 2011, the Court sentenced Mr. Mendoza to 102 months
16 incarceration and a three-year term of supervised release as specified in the plea
17 agreement. ECF No. 173 at 1-6. On July 20, 2012, Mr. Mendoza filed the present
18 motion arguing he is being held in violation of the Constitution, laws, or other
19 treaties of the United States and alleging that the Court's sentence was excessive or
20 unreasonable. ECF No. 203 at 5. Mr. Mendoza challenges the language of 18

1 U.S.C. § 924(c), specifically regarding its “use” and “carry” provisions, and
2 challenges the application of 18 U.S.C. § 924(c) instead of U.S. Sentencing
3 Guideline § 2D1.1(b)(1). ECF No. 203 at 5.

4 Mr. Mendoza directs the Court’s attention to *United States v. Booker*,
5 arguing that the district court must use the sentencing factors in 18 USC § 3553(a)
6 to fashion a sentence that is sufficient, but not greater than necessary. ECF No.
7 203 at 5; *see* 543 U.S. 220, 264 (2005). Accordingly, Mr. Mendoza moves the
8 Court to correct his sentence by applying U.S. Sentencing Guideline § 2D1.1(b)(1)
9 instead of 18 U.S.C. § 924(c). ECF No. 203 at 10. Additionally, on January 14,
10 2013, Mr. Mendoza filed a motion for appointment of counsel to assist him with
11 his § 2255 motion. ECF No. 204.

12 DISCUSSION

13 Motion for Appointment of Counsel

14 A prisoner in custody may move the court which imposed his or her
15 sentence to vacate, set aside, or correct the sentence on grounds including “the
16 sentence was imposed in violation of the Constitution or law of the United States,
17 or that the court was without jurisdiction to impose such sentence, or that the
18 sentence was in excess of the maximum authorized by law, or is subject to
19 collateral attack.” 28 U.S.C. § 2255(a) (2006). Pursuant to Rule 4 of the Rules
20 Governing § 2255 Proceedings for the United States District Courts (“Rule 4”), if

1 it “plainly appears from the [§ 2255] motion, any attached exhibits, and the record
2 of prior proceedings that the moving party is not entitled to relief, the judge must
3 dismiss the motion.” Rule 4(b).

4 However, if the moving party is entitled to relief, the judge must order the
5 government to respond. *Id.* Further, if the judge authorizes discovery or if the
6 petition is not dismissed and an evidentiary hearing is warranted, “the judge must
7 appoint an attorney for a moving party who qualifies to have counsel appointed
8 under 18 U.S.C. § 3006A.” Rule 6(a); Rule 8(c). Here, discovery neither has been
9 requested nor authorized. In addition, after reviewing the pleadings and per the
10 discussion below, the Court finds that Mr. Mendoza has failed to state a claim on
11 which relief can be granted, and, therefore, neither discovery nor an evidentiary
12 hearing is warranted in this matter. See *United States v. Leonti*, 326 F.3d 1111,
13 1116 (9th Cir. 2003). Therefore, the Court denies Mr. Mendoza’s motion for
14 appointment of counsel.

15 **Waiver**

16 Nothing precludes a defendant from waiving the statutory right to file a
17 § 2255 petition challenging the length of his sentence. *United States v. Navarro-*
18 *Botello*, 912 F.2d 318, 321 (9th Cir. 1990); *United States v. Cope*, 527 F.3d 944,
19 949 (9th Cir. 2008). Such a waiver is enforceable if ““(1) the language of the
20 waiver encompasses [the defendant’s] right to appeal on the grounds raised, and

1 (2) the waiver is knowingly and voluntarily made.” *United States v. Leniear*, 574
2 F.3d 668, 672 (9th Cir. 2009) (quoting *United States v. Speelman*, 431 F.3d 1226,
3 1229 (9th Cir. 2005)); *see also Abney v. United States*, 431 U.S. 651, 656 (1997)
4 (“[T]here is no constitutional right to appeal.”).

5 Waiver of appeal rights does not “categorically foreclose” all § 2255
6 proceedings, “such as a claim of ineffective assistance of counsel or
7 involuntariness of waiver.” *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir.
8 1993); *see also Washington v. Lampert*, 422 F.3d 864, 870 (9th Cir. 2005).
9 Generally, however, an express waiver of a statutory right, including § 2255
10 petitions, bars the defendant from moving the sentencing court to vacate, set aside,
11 or correct the sentence. *Abarca*, 985 F.2d at 1014.

12 As part of his plea agreement, Mr. Mendoza waived his right to challenge
13 his sentence by direct appeal or by motion under § 2255, except for a challenge
14 asserting ineffective assistance of counsel based on information not known to Mr.
15 Mendoza at the time of sentencing. ECF No. 149 at 13. Mr. Mendoza does not
16 bring a challenge asserting ineffective assistance of counsel claim. ECF No. 203.
17 Nor does Mr. Mendoza challenge the voluntariness of the waiver. ECF No. 203 at
18 1. Instead, Mr. Mendoza moves this Court to correct his sentence by applying the
19 U.S. Sentencing Guidelines § 2D1.1(b)(1) instead of the “special ‘mandatory
20 minimum’” “gun ‘use’ statute,” 18 U.S.C. § 924(c). ECF No. 203 at 5, 10. Such

1 an issue was “clearly contemplated by, and subject to, his plea agreement waiver,”
2 and consequently forecloses Mr. Mendoza from seeking collateral relief from his
3 sentence. *See Abarca*, 985 F.2d at 1014.

4 **Excessiveness or Unreasonableness of Sentence**

5 Even if the Court were inclined to reach the merits of Mr. Mendoza’s § 2255
6 motion, the motion would still fail. In his § 2255 motion, Mr. Mendoza argues that
7 his sentence was excessive or unreasonable because (1) the terms “use” and
8 “carry” in 18 U.S.C. § 924(c) connote activity beyond simple possession and he
9 never possessed the firearm; and (2) because the court applied the statutory five-
10 year mandatory minimum sentence under § 924(c) in sentencing Mr. Mendoza
11 instead of adhering to the sentencing guidelines. ECF No. 203 at 5.

12 **Carry, Use, and Possession Under 18 U.S.C. § 924(c)(1)**

13 A prior version of 18 U.S.C. § 924(c)(1) stated: “[w]hoever, during and in
14 relation to any crime of violence or drug trafficking crime . . . *uses or carries* a
15 firearm, shall, in addition to the punishment provided for such crime of violence or
16 drug trafficking crime, be sentenced to imprisonment for five years” 18
17 U.S.C. § 924(c)(1) (1998) (current version at 18 U.S.C. § 924(c)(1) (2012))
18 (emphasis added). “Use” was narrowly interpreted to connote “more than mere
19 possession of a firearm” and to require proof of “active employment of the firearm
20 by the defendant, a use that makes the firearm an operative factor in relation to the

1 predicate offense.” *Bailey v. United States*, 516 U.S. 137, 143-44 (1995).

2 “Carries” was interpreted to require proof that a “defendant carried a firearm on his
3 person or ‘knowingly possesse[d] and convey[ed] firearms in a vehicle.’” *United*
4 *States v. Arreola*, 467 F.3d 1153, 1160 (9th Cir. 2006) (quoting *United States v.*
5 *Foster*, 165 F.3d 689, 689-92 (9th Cir. 1999)). The “use” or “carrying” must relate
6 to the underlying drug offense such that the “firearm ‘facilitated or had a role in the
7 crime.’” *Id.* (quoting *United States v. Streit*, 962 F.2d 894, 899 (9th Cir. 1992)).

8 Following the Supreme Court’s narrow interpretation of “use” and “carry” in
9 *Bailey*, Congress amended the statute to include possession. The current version of
10 18 U.S.C. § 924(c)(1), and version of the statute applicable in this case, states:

11 any person who, during and in relation to any crime of violence or
12 drug trafficking crime . . . uses or carries a firearm, or who, *in*
13 *furtherance of any such crime, possesses a firearm*, shall, in addition
to the punishment provided for such crime of violence or drug
trafficking crime . . . be sentenced to a term of imprisonment of not
less than 5 years.

14 18 U.S.C. § 924(c)(1) (emphasis added).

15 “Possession” requires that the government prove “the defendant possessed
16 the weapon to promote or facilitate the underlying crime.” *United States v. Krouse*,
17 370 F.3d 965, 967 (9th Cir. 2004). The possession must be “in furtherance of” the
18 crime of violence or drug trafficking crime. 18 U.S.C. § 924(c)(1). This requires
19 the government prove “a nexus between the guns discovered and the underlying
20

1 offense” to establish the possession required by 18 U.S.C. § 924(c)(1). *Krouse*,
2 370 F.3d at 968.

3 Here, officers located a Ruger model 10/22, .22 caliber rifle in the living
4 area of the grow operation, which was within an arm’s reach of any persons within
5 the living area. ECF No. 149 at 7. Additionally, law enforcement located two
6 boxes of .22 caliber ammunition in the living area. ECF No. 149 at 7 . The firearms
7 were strategically located within easy reach of the living area, which was in close
8 proximity to the marijuana grow. ECF No. 149 at 7. Accordingly, even if the
9 Court accepts Mr. Mendoza’s contention that he never used, carried, or physically
10 possessed the Ruger model firearm, the evidence establishes a sufficient nexus that
11 Mr. Mendoza possessed the firearm in furtherance of a drug trafficking crime
12 because the firearm and ammunition were in close proximity of the marijuana
13 grow and were quickly and easily available for use. *See Krouse*, 370 F.3d at 968-
14 69; *see also United States v. Luciano*, 329 F.3d 1, 6 (1st Cir. 2003) (finding that
15 guns discovered in “close proximity . . . to [a] significant stockpile of heroin”
16 established a “nexus” between the weapons and drug trafficking activity); *United*
17 *States v. Lawrence*, 308 F.3d 623, 630 (6th Cir. 2002) (“The jury’s verdict . . . is
18 supported by the close proximity of the weapons to the drugs and the fact that these
19 weapons were found either loaded or with ammunition.”); *United States v.*
20 *Basham*, 268 F.3d 1199, 1208 (10th Cir. 2001) (“[A] firearm that is kept available

1 for use if needed during a drug transaction is possessed in furtherance of drug
2 trafficking.”); *United States v. Mackey*, 265 F.3d 457, 462 (6th Cir. 2002) (“[T]he
3 firearm must be strategically located so that it is quickly and easily available for
4 use.”). Therefore, Mr. Mendoza did in fact possess the gun in furtherance of the
5 drug trafficking crime for which he pleaded guilty. *See* ECF 149 at 1-2.

6 **Sentence Scoring**

7 The U.S. Sentencing Guidelines (the “Guidelines”) are not a product of
8 Congress, but are instead promulgated by a sentencing committee. After *United*
9 *States v. Booker*, “[t]he district courts, while not bound to apply the Guidelines,
10 must consult those Guidelines and take them into account when sentencing.” 543
11 U.S. at 264. Guideline § 2K2.4 is the offense guideline applicable for violation of
12 18 U.S.C. § 924(c). U.S.S.G. Appx. A (2012). Guideline § 2K2.4 states that “if the
13 defendant, whether or not convicted of another crime, was convicted of violating
14 section 924(c) . . . of title 18, United States Code, *the guideline sentence is the*
15 *minimum term of imprisonment required by statute.*” U.S.S.G. § 2K2.4(b)
16 (emphasis added). The statute in this case, 18 U.S.C. § 924(c)(1), mandates a
17 minimum five year imprisonment of “any person who, during and in relation to
18 any crime of violence or drug trafficking crime . . . uses or carries a firearm, or
19 who, in furtherance of any such crime, possesses a firearm.” 18 U.S.C. § 924(c)(1).

1 The five year minimum is to be added to the punishment provided for the crime of
2 violence or drug trafficking crime. *Id.*

3 Alternatively, Chapter Two of the Guidelines pertains to offense conduct
4 and is used to establish the base offense level for such conduct. “Section
5 2D1.1(b)(1) provides for an increase by two levels of the base offense level ‘if a
6 dangerous weapon (including a firearm) was possessed’ during an offense
7 involving drugs.” *United States v. Aquino*, 242 F.3d 859, 863 (9th Cir. 2001). Mr.
8 Mendoza asks this Court to apply Guideline § 2D1.1(b)(1) instead of 18 U.S.C. §
9 924(c). ECF No. 203 at 5, 10. However, Mr. Mendoza pleaded guilty to violating
10 18 U.S.C. § 924(c). ECF No. 149 at 1-2. Accordingly, Guideline § 2K2.4 refers to
11 18 U.S.C. § 924(c) and consequently compels a statutorily mandated five year
12 minimum sentence. 18 U.S.C. § 924(c)(1)(A)(i); U.S.S.G. § 2K2.4. As such, for
13 this Court to apply Guideline § 2D1.1(b)(1) instead of 18 U.S.C. § 924(c) would be
14 erroneous. Therefore, the Court rejects Mr. Mendoza’s § 2255 motion.

15 **Certificate of Appealability**

16 An appeal of this Order may not be taken unless this Court or a Circuit
17 Judge issues a certificate of appealability, finding that “the applicant has made a
18 substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).
19 This requires a showing that “reasonable jurists would find the district Court's
20 assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*,

1 529 U.S. 473, 484 (2000). If a claim is dismissed on procedural grounds the Court
2 must determine whether “jurists of reason would find it debatable whether the
3 petition states a valid claim of the denial of a constitutional right and that jurists of
4 reason would find it debatable whether the district court was correct in its
5 procedural ruling.” *Slack*, 529 U.S. at 474.

6 A certificate of appealability should not be granted unless both components,
7 one directed at the underlying constitutional claims, and the second directed at the
8 Court's procedural holding, are satisfied. *Id.* The Court may address either the
9 constitutional or procedural issue first. *Id.* Based on the Court's preceding
10 analysis, the Court concludes: (1) that Mr. Mendoza has failed to make a
11 substantial showing of a denial of a constitutional right; and (2) that jurists of
12 reason would not find it debatable whether the Court was correct in any substantive
13 or procedural ruling. Thus, a certificate of appealability should not issue.

14 Accordingly, **IT IS HEREBY ORDERED:**

15 1. Defendant’s motion for appointment of counsel, **ECF No. 204** in case
16 **CR-10-2091-RMP**, is **DENIED**.

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1 2. Defendant's motion to vacate, set aside, or correct sentence, **ECF No.**
2 **203 in CR-10-2091-RMP, is DENIED.**

3 **IT IS SO ORDERED.**

4 The District Court Clerk is directed to enter this Order, enter Judgment
5 accordingly, and close this case and close the accompanying civil statistic case 12-
6 3096-RMP.

7 **DATED** this 2nd day of April 2013.

8
9 *s/ Rosanna Malouf Peterson*

10 **ROSANNA MALOUF PETERSON**
11 **Chief United States District Court Judge**
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